**THIRUCHELVASEGARAM MANICKAVASEGAR** A

**v.**

**MAHADEVI NADCHATIRAM**

HIGH COURT MALAYA, KUALA LUMPUR B
ABDUL WAHAB PATAIL J
[CIVIL NO: S3(S2)-23-85-2000]
8 NOVEMBER 2005

***CIVIL PROCEDURE**: Contempt of court - Order of commital, application for - Defendant disagreeing with findings of fact by High Court and Court of Appeal - Whether could be interpreted as contumelious - Whether defendant has the right to apply to set aside leave for committal proceeding* C

D

Enclosure 36 was the plaintiff's application for committal against defendant while encl. 40 was the defendant's application to set aside leave for committal proceeding. The plaintiff argued that since the court had granted leave to commence committal, it was a *prima facie* finding that there was contempt, and therefore the E defendant's application at encl. 40 could not be heard until she had purged her contempt. Therefore also, since encl. 40 could not be heard, it was submitted that the court should proceed with encl. 36, being the plaintiff's application for committal. The subject matter of the application to commit the defendant for contempt F was an affidavit by the defendant making assertions and imploring that she disagreed with findings of fact by the High Court and the Court of Appeal. It was submitted in so doing, the defendant, a lawyer of at least 20 years standing, showed she was of the view that the judicial system was inadequate to determine the truth.

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**Held (dismissing applications at encls. 36 and 40):**

**(1)** The application for leave to commence committal proceedings was made *ex parte,* with the defendant having no opportunity of being heard. The *ex parte* application for leave authorized H putting the defendant into having to incur the cost to defend himself. The full burden of that cost might be avoided if an application to set aside leave is successful. Whether such an application is successful must depend upon the circumstances and merits of each case. The court therefore ruled that the I

application at encl. 40 should be heard first. However, since the applicant's own application for committal at encl. 36 was also ready to be heard, both applications were ordered to be heard together. (para 5)

**(2)** The assertions in the affidavit were consistent with the defendant's versions of facts and events in the courts. Even though the High Court had found against her, and the Court of Appeal had disagreed with her, she had at all times a right to appeal to the Federal Court. She had a right to seek to persuade the relevant forum that her version was true and correct. The mere fact that the version she maintained disagreed with the finding of the court could not therefore be interpreted as contumelious. (para 6)

**(3)** The rule that an order of court was to be obeyed unless stayed or set aside was necessary for the orderly administration of justice, but it did not exist in isolation or to the exclusion of the right of appeal, which right existed so that decisions of the courts may be scrutinized and reviewed with the ultimate objective of seeking a fair and just decision according to law. It had never been intended to shackle or suppress a party from maintaining a position consistent with and in pursuit of its cause until a final disposal. (para 7)

*For the plaintiff - Malik Imtiaz Sarwar; M/s Sykt M Segaram*
*For the defendant - M Manoharan; M/s Mahadevi Nadchtiram & Partners*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Abdul Wahab Patail J:**

**[1]** The following applications were set down for hearing on 2 April 2003:

(i) Enclosure 18: Defendant's appeal to judge in chambers against decision of senior assistant registrar dismissing defendant's application to strike out main action on grounds that publication to the disciplinary board is covered by absolute privilege.

(ii) Enclosure 36: Plaintiff's application for committal against defendant.

(iii) Enclosure 40: Defendant's application to set aside leave for committal proceeding. A

**Whether encl. 40 Should Be Entertained**

**[2]** The plaintiff argued that since court had granted leave to commence committal, it is a *prima facie* finding that there was contempt, and therefore the defendant's application at encl. 40 cannot be heard until she has purged her contempt. Therefore also, since encl. 40 cannot be heard, it was submitted that the court should proceed with encl. 36, being the plaintiff's application for committal. B C

**[3]** Although it is true that a *prima facie* finding of contempt is necessary to be made out for leave to be granted, it does not necessarily follow that the defendant is barred from an application to set aside leave. Where such an application is made, it must be heard first before the hearing on committal. There is the argument that the court should not entertain applications to set aside leave since the issue of whether there was contempt would be settled in the committal proceeding itself. Patent injustice could occur if a party obtains leave but chooses not to proceed with committal proceedings: would the other party always be barred from being heard in other cases? The application for leave to commence committal proceedings is made *ex parte*, with the defendant having no opportunity of being heard. The *ex parte* application for leave authorises putting the defendant into having to incur the cost to defend himself. The full burden of that cost might be avoided if an application to set aside leave is successful. Whether such an application is successful must depend upon the circumstances and merits of each case. For example, if the court had been misled into granting leave, the court will set aside leave which has been granted. D E F G

**[4]** The court, therefore, rules that the application at encl. 40 can and ought to be heard first. However, since the plaintiff's own application for committal at encl. 36 is also ready to be heard, the court orders both applications to be heard together. H

**Enclosures 36 & 40**

**[5]** The subject matter of the application to commit the defendant for contempt is an affidavit by the defendant dated 12 November 2001. In the affidavit the defendant made assertions on her behalf, imploring "I have to be believed ..." where her version I

A disagreed with findings of fact by the High Court and the Court of Appeal. There was at the material time an appeal to the Federal Court. It was submitted by the plaintiff that it means that she maintains that the findings of the court were not correct. The defendant also made request that the witnesses who were called
B in the proceedings should be brought to the temple. It was submitted in so doing the defendant, a lawyer of at least 20 years' standing, showed she was of the view that the judicial system is inadequate to determine the truth of the matters the witnesses deposed to. The affidavit was made in relation to an
C application where she was being taken to task for a letter dated 27 November 2000 written to the disciplinary board constituted under the Legal Profession Act 1976.

**[6]** The assertions in the affidavit of 12 November 2001 by the
D defendant are consistent with her version of facts and events in the High Court, Court of Appeal, and, one would expect, in the Federal Court. Even though the High Court has found against her, and the Court of Appeal disagreed with her, she had at all times a right to appeal to the Federal Court. In her pursuit under her
E right to appeal, she has a right to seek to persuade the relevant forum that her version is true and correct. She can only do that if she maintains that version consistently. The mere fact that the version she maintains disagrees with the finding of the court cannot, therefore, be interpreted as contumelious. While the
F orders of the court are to be obeyed unless it is stayed or set aside, and disobedience of the order is clearly a contempt, maintaining a version of facts that differs from the facts as found by the court is not necessarily contumelious, particularly when maintained while there is an appeal pending.

G **[7]** The rule that an order of court is to be obeyed unless stayed or set aside is necessary for the orderly administration of justice, but it does not exist in isolation or to the exclusion of the right of appeal, which right exists so that decisions of the courts
H may be scrutinised and reviewed with the ultimate objective of seeking a fair and just decision according to law. It has never been intended to shackle or suppress a party from maintaining a position consistent with and in pursuit of its cause until a final disposal.

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**[8]** Secondary proceedings such as this application, between the parties, contribute to the decade-long legal proceedings involving the parties and their siblings, hogging, monopolizing and diverting considerable time and legal resources of the parties as well as of the courts, in legal adventures away from resolving the original dispute between the parties.

**[9]** For all of the above reasons, the applications at encls. 36 and 40 are dismissed with costs.